IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

MONDAY, THE 18TH JUNE 2007 / 28TH JYAISHTA 1929

CRL.A.No. 619 of 1998()

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CC.690/1994 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, KANNUR

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APPELLANT: COMPLAINANT

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M/S.SOUMYA SAREES
BELLARD ROAD, KANNUR-1
REPRESENTED BY ITS MANAGING PARTNER GIREESH
S/O.A.V.KUNHAMBU
CHETTIPEEDIKA, KANNUR-4.

BY ADV. SRI.K.G.BALASUBRAMANIAN

RESPONDENT: ACCUSED

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B.MANIKANTAN
KIZHAKKE KOVIL STREET
RAJA ROAD
NILESWARAM - 670314.

BY ADV. SRI.JOSHI N.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K.R.UDAYABHANU, J**

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Crl.A.No.619 of 1998

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Dated this the 18th day of June, 2007

**JUDGMENT**

The appellant is the complainant in the proceedings initiated under Section 138 of the Negotiable Instruments Act which stands dismissed.

2. The case of the complainant/appellant is that the petitioner/partnership firm is conducting wholesale cloth business and that the accused used to purchase clothes on credit basis and owed for a sum of Rs.31,875/- and towards the same he issued the impugned cheque dated 11.4.1995 which when presented got bounced for want of funds in the account of the accused. The lawyer notice was replied to raising false allegations against the complainant.

3. The evidence adduced in the matter consisted the testimony of PW1, Exts. P1 to P8. At the instance of defence, DW1, the accused was examined and Exts. D1 to D3 were marked.

4. The trial court on a consideration of evidence adduced

in the matter found that the evidence of PW1 that there was no practice to take blank cheques as security at the time of selling goods cannot be believed. It was found that the version of DW1 in this regard is more probable. It is also found that on the basis of Exts. D1 series and D3 series receipts with respect to the payments and on the basis of Ext. D2 letter issued by the complainant dated 20.10.1993 that the claim can only be with respect to only a sum of Rs.31,866.95/- as on 20.10.1993. The cheque amount used is Rs.39,875/-. The court held that there is no explanation for the enhanced amount mentioned in the cheque. Although, PW1 has stated that he is having the records with respect to the transaction and he has also stated that the ledger extract has been produced and that the original has been produced in the civil case. I find that so called ledger extract has not been marked.

5. Counsel for the respondent has relied on the decision reported in Narayana Menon vs. State of Kerala (2006(3) KLT 404 (SC)) wherein it has been held that it is not necessary for the accused to disprove the prosecution case and the standard of proof for him is preponderance of probabilities. Hence, in the

particular case, it is the contention of the counsel for the respondent that the accused has discharged his initial burden in this regard and the rest of the matter related to appreciation of evidence.

6. In the circumstances of the case it appears to me, as submitted by the counsel for the appellant that an opportunity to the complainant has to be given to produce his part of evidence in the matter. Hence, the order of the court below is set aside. The court below is directed to permit the parties to adduce further evidence of they so desire and dispose of the case on merits. The parties shall appear before the court below on 18.7.2007.

The criminal appeal is disposed of as above.

**K.R.UDAYABHANU,**
**JUDGE**

csl